86

FILED
FEB 19 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(4)

No. 07-907

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH W. JOHNSON,
Petitioner,

v.

JESSE GADSON, et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the
District of Columbia Circuit

REPLY BRIEF FOR PETITIONER KENNETH W. JOHNSON IN REPLY TO THE BRIEF IN OPPOSTION FOR RESPONDENTS TONY S. LEE AND McGUIREWOODS LLP

Kenneth W. Johnson
Non-attorney, *pro se litigant of record*
9803 Allenford Circle, Apt. 203
North Potomac, Md. 20850
Telephone: (240) 314-7188

Questions Presented for Review

1) Johnson is a White man of mixed racial ancestry who alleges that he "looks either Caucasian/European or predominately Caucasian/European"; 2) Johnson sought to enter into a contractual relationship with the defendant(s); 3) **Johnson met the defendant's ordinary requirements** to pay for and to receive goods or services ordinarily provided by the defendants to other similarly situated customers; and 4) **Johnson was refused or denied the goods or services** that w[ere] otherwise afforded to nonwhite customers:

1) Does Johnson's Amended Complaint fail to state a claim upon which relief may be granted under TITLE 42 U.S.C. § 1981, when Johnson alleged that he was discriminated against in violation of the prohibition of racial discrimination against whites?
2) Does any of the Judgments or Orders of the U.S. Court of Appeals or the U.S. District Court, conflict with a decision of the Supreme Court of the United States in either *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002), or *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 274(1976), or *Foman v. Davis*, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222, or deny Johnson equal protection of law, when Johnson alleged that he was refused services because he is a white man of mixed racial ancestry?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States District Court for the District of Columbia and United States Court of Appeals for the District of Columbia Circuit.

The Petitioner here and Plaintiff – Appellant is Kenneth W. Johnson.

The Respondent here and Defendants – Appellees are Jesse Gadson, Tony Lee, Herbert N. Harmon, Robert F. Condon, Elbert Shore, McGuireWoods LLP.

CORPORATE DISCLOSURE STATEMENT

Kenneth W. Johnson is a person, an individual, a human being, and therefore, is not a corporation. There is no parent or publicly held company owning 10% or more of any corporate stock, a statement to this effect shall be included on this page. Supreme Court Rule 29.6.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

PARTIES TO THE PROCEEDINGS.....ii

CORPORATION DISCLOSURE STATEMENT....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....iv-vi

JURISDICTION 1

REPLY STATEMENT OF THE CASE.....2

ARGUMENT

The issue of whether Johnson failed to state a claim upon which relief may be granted.....6

The issue of whether Johnson was deny equal protection of law and equal benefit of law.....7

CONCLUSION.....13

TABLE OF AUTHORITIES

FEDERAL CASES

Aka v. Wash. Hosp. Ctr., 156 F.3d at 1284, 1289 (D.C. Cir. 1998) (en banc).....6, 8

Brown v. United States, 239 U.S.App.D.C.345, 356-357 (en banc).....11

Carter v. District of Columbia, 14 F.Supp. 2d 97, 102 (D.D.C. 1998).....5

Foman v. Davis, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222.....i, 7, 8

Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577.....4, 5

Hazel-Atlas Glass Co. v. Hartford-empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L. Ed. 1250.....9

Kenner v. Commissioner of the Internal Revenue, 387 F.2d 689, 691, certiorari denied 89 S.Ct. 121, 393 U.S. 841, 21 L.Ed.2d 112.....10

Lockwood v. Bowles, D.C.D.C. 1969, 46 F.R.D. 625, 634.....9

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, at 274.....i, 2, 7, 8

McDonnell Douglas Corp. v. Green.....3, 4

Owens v. Okure, 488 U.S. 235, 249-50(1989).....5

Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005).....12

Serysko v. Chase Manhattan Bank, 461 F.2d 699, certiorari denied 93 S.Ct. 173, 409 U.S. 883, 34 L.Ed.2d 139.....10

Swierkiewicz v. Sorema, 534 U.S. 506.....i, 2, 3, 4, 5, 6, 7, 8

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121.....4

Valerio v. Boise Cascade Corp., 80 F.R.D. 625, 640, citing Wright & Miller, affirmed C.A. 9th, 645 F.2d 699, certiorari denied 102 S.Ct. 976, 454 U.S. 1126, 71 L.Ed.2d 113.....10

Wilkin v. Sunbeam Corp., 405 F.2d 165.....10

FEDERAL STATUTES

TITLE 28 U.S.C § 1254.....1

TITLE 42 U.S.C. § 1981.....i, 2, 3, 5, 8

TITLE 42 U.S.C. § 1983.....5

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8(a)(2).....4

Rule 15(a) and (c).....8

Rule 60(b).....8, 9

Rule 59(e).....8

STATE CASE

Cobb v. Cobb, 116 WLR 1993 (Super. Ct. 1998)....10

STATE STATUES

D.C. Code § 12-301(1).....11

D.C. Code § 12-301(8).....5

D.C. Code § 12-309.....11

OTHER AUTHORITES

WRIGHT-MILLER-KANE,
Federal Practice and Procedure
§ 2870, pages 409-412.....10

JURIDICTION

On October 9th 2007, the United States Court of Appeals for the District of Columbia Circuit entered its JUDGMENT, which states:

"This appeal was considered on the record from the United States District Court for the District of Columbia and on the brief's filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the judgment of the district court be affirmed. The district court correctly concluded that appellant's complaint failed to state a claim upon which relief could be granted"

The text of this unreported per curiam decision is reproduced at pages 1-2 of the Appendix to the Petition for Writ of Certiorari.

Kenneth Johnson hand delivered to the Supreme Court 40 copies of THE DOCKETED Petition for Writ of Certiorari in No. 07-907 on the NIGHT of January 8, 2008. It was subsequently placed on the docket THE NEXT MORNING, which was January 9, 2008 by the Clerk of the Supreme Court. The jurisdiction of this Court is based on the October 10, 2007 JUDGMENT of the United States Court of Appeals for the District of Columbia. Jurisdiction is conferred to the Supreme Court of the United States by Title 28 U.S.C § 1254.

REPLY STATEMENT OF THE CASE

The "Brief in Opposition for Respondents Tony S. Lee and McGuireWoods LLP" maintains that the U.S. District Court "...observed that Petitioner's Section 1981 claim failed because his 'allegations that defendants saw him as white and treated him like a white person because he is mostly white hardly states a claim grounded in some differential treatment based upon race that is cognizable under § 1981." (Brief in Opp. at 3) completely misses the point. Johnson alleged that he was racially discriminated against because he is a White man and was refused the legal services that were otherwise afforded to nonwhites. The fact that the Defendants saw him as white and treated him like a white man is not the issue; the fact that the Defendants refused Johnson the legal services that they afford to nonwhites customers is the issue. The "Questions Presented" in the Petition for Writ of Certiorari and repeated here make it clear what the issues are that [t]he Petitioner has ask this Court to decide.

The United States Court of Appeals ruled against a firm act of law established by this Court in *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002), as well as *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 274(1976). In *Swierkiewicz Id.* supra, the Petitioner, a 53-year-old native of Hungry, filed a lawsuit against the respondent, his former employer, alleging that he had been fired on account of his national origin in violation of Title VII of the Civil Rights Act of 1964

and on account of his age in violation of the Age Discrimination in Employment Act of 1967(ADEA). In affirming the District Court's dismissal of the complaint, the Second Circuit relied on its settled precedent requiring an employment discrimination complaint to allege facts constituting a prima facie case of discrimination under the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802. The Second Circuit held that petitioner had failed to meet his burden *because his allegations were insufficient as a matter of law to raise an inference of discrimination.* The Supreme Court of the United States reversed the Second Circuits holding and remanded the case for further proceedings consistent with its opinion: See *Swierkiewicz v. Sorema*, 534 U.S. at pages 506, 507 and 515(2002).

Here it is uncontroverted that the U.S. District Court as well as the U.S. Court of Appeals held that Kenneth W. Johnson failed to meet his burden *because his allegations were insufficient as a matter of law to raise an inference of discrimination*, when they held "Petitioner's Section 1981 claim failed because his 'allegations that defendants saw him as white and treated him like a white person because he is mostly white hardly states a claim grounded in some differential treatment based upon race that is cognizable under § 1981". This holding is in direct conflict with the holding of the Supreme Court in *Swierkiewicz v. Sorema*, 534 U.S. at 506 and 507(2002), where the Supreme Court reversed the Second Circuit.

In addition, the Supreme Court in *Swierkiewicz v. Sorema*, 534 U.S. at 506 "*Held*: An employment discrimination complaint need not contain specific facts establishing a prima facie case under the McDonnell Douglas framework, but instead must contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' Fed. Rule Civ. Proc. 8(a)(2). The *McDonnell Douglas* framework—which requires the plaintiff to show (1) membership in a protected group, (2) qualification for the job in question, (3) an adverse employment action, and (4) circumstances supporting an inference of discrimination—is an evidentiary standard, not a pleading requirement. See, e.g., 411 U.S., at 800. The Court has never indicated that the requirements for establishing a prima facie case apply to pleading. Moreover, the *McDonnell Douglas* framework does not apply where, for example, a plaintiff is able to produce direct evidence of discrimination. See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121. Under the Second Circuit's heightened pleading standard, however, a plaintiff without direct evidence at the time of his complaint must plead a prima facie case of discrimination even though discovery might uncover such direct evidence. It seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered. Moreover, the precise requirements of the prima facie case can vary with the context and were 'never intended to be rigid, mechanized, or ritualistic.' *Furnco*

Constr. Corp. v. Waters, 438 U.S. 567, 577. It may be difficult to define the precise formulation of the required prima facie case in a particular case before discovery has unearthed relevant facts and evidence. Consequently, the prima facie case should not be transposed into a rigid pleading standard for discrimination cases."—*Swierkiewicz v. Sorema,* 534 U.S. at 506 and 507(2002).

Furthermore, the U.S. District Court in *Johnson v. Gadson* et al 06-22(RWR) *held*: Defendants also argue that issue preclusion and the statute of limitations should bar this action. These contentions are without merit. Issue preclusion does not apply here because the events giving rise to the claims against the moving defendants have never before been litigated. The three-year D.C. statute of limitations on personal injury claims, D.C. Code § 12-301(8), which applies here by operation of a Supreme Court decision, *Owens v. Okure,* 488 U.S. 235, 249-50(1989), does not bar this action because Johnson filed this action on January 9, 2006, complaining of events that occurred no earlier than January 15, 2003. See also *Carter v. District of Columbia,* 14 F.Supp. 2d 97, 102 (D.D.C. 1998)(stating that plaintiffs in this court "have the right to bring a Section 1981 or a Section 1983 claim at any time within three years of the alleged discrimination").

ARGUMENT

A. The issue of whether Johnson failed to state a claim upon which relief may be granted

Attorney Jesse Gadson, a Black attorney, stated to Kenneth Johnson's face, "You have no civil rights", because of the fact that Johnson is a White man of mixed racial ancestry. He does not think that Black people have no civil rights; he only thinks that Kenneth W. Johnson has no civil rights, because of the fact that Kenneth W. Johnson is a White man of mixed racial ancestry. Kenneth W. Johnson alleges in the Amended Complaint that Jesse Gadson told him to his face, "***You have no civil rights***". The allegation must be taken as true. See *Swierkiewicz v. Sorema*, 534 U.S. 506. The statement by Jesse Gadson: "***You have no civil rights***" falls in the category ***of discriminatory statements or attitudes*** on the part of the defendant. See *Aka v. Wash. Hosp. Ctr.*, 156 F.3d at 1284, 1289 (D.C. Cir. 1998) (en banc). Jesse Gadson's statement begs the question: What is it about Kenneth W. Johnson that makes Jesse Gadson think that Kenneth W. Johnson has no civil rights [?], which is what Gadson said. Jesse Gadson does not think his Black clients have no civil rights; he thinks that about Kenneth W. Johnson, because Johnson is a White man of mixed racial ancestry.

Jesse Gadson, Tony Lee, and McGuireWoods LLP discriminated against Johnson. See Amended Complaint at pages 51-61, 68-79, and 39-50.

B. The issue of whether Johnson was *deny equal protection of law and equal benefit of law.*

The "Brief in Opposition for Respondents Tony S. Lee and McGuireWoods LLP" maintains that the "Petitioner's equal protection claim, not formally pled in the district court as a count in the Amended Complaint, similarly fails to state any cause of action" completely misses the point. The issue is not whether the Defendants denied Johnson equal protection of law, or equal benefits of law, but Whether the U.S. District Court and/or the United States Court of Appeals denied Johnson equal protection of law and equal benefits of law.

What Johnson is saying is that by disobeying the Supreme Court's precedent in *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002), or *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 274(1976), or *Foman v. Davis*, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222, the U.S. District Court and the United States Court of Appeals for the District of Columbia Circuit have denied Johnson equal protection of law.

The U.S. District Court should have 1) vacated its judgment; 2) allowed Johnson to conduct discovery of the defendants; and 3) allowed Johnson to amend the June 9th 2006 Amended Complaint. By not doing so, the U.S. District Court denied Johnson equal protection of law and equal benefit of law. The Judgment was affirmed on appeal, thus, denying Johnson equal protection of

law. Discovery would have revealed that the Defendants offer their services to nonwhite customers, yet refused Kenneth Johnson. Johnson did not need to amend the Complaint to assert allegations that he was racially discriminated against, because those allegations were already present in the Amended Complaint. Johnson wanted to conduct discovery of the defendants, add additional allegations to the Amended Complaint, and change the "Compensatory and Punitive Damages" portion of the Amended Complaint at page 101 of the Amended Complaint.

Johnson has been denied the protections of law and the benefits of law that are spelled out in *Swierkiewicz v. Sorema*, 534 U.S. 506, 511 (2002), or *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 274(1976), or *Foman v. Davis*, 83 S.Ct. 227, 371 U.S. 178, 182, 9 L.Ed.2d 222 or TITLE 42 U.S.C. § 1981 or Fed.Rules.Civ.Proc.Rules 15(a), 59(e), 60(b), 28 U.S.C.A. or *Aka v. Wash. Hosp. Ctr.*, 156 F.3d at 1284, 1289 (D.C. Cir. 1998) (en banc)! Johnson did not fail to state a claim upon which relief may be granted.

Aka v. Wash. Hosp. Ctr.,, 156 F.3d at 1284, 1289(D.C. Cir. 1998) (en banc) holds: In attacking a defendant's explanation, a plaintiff is entitled to offer three categories of evidence: (1) evidence establishing the plaintiff's prima facie case; (2) evidence the plaintiff presents to attack the Defendant's proffered explanation for its actions; and (3) any further evidence of discrimination that may be available to the plaintiff; such as

independent ***evidence of discriminatory statements or attitudes*** on the part of the Defendants. The explanations that the Defendants gave to Kenneth W. Johnson w[ere] merely pretext to hide [t]he racial discrimination against Johnson, because Johnson is a White man of mixed racial ancestry.

Tony Lee and McGuireWoods LLP were not "time-barred" from pursuing Johnson's claims of fraud upon the court, as a matter of law. "The only instance in which Rule 60(b) allows for the reopening of lawsuits regardless of the passage of time is when there is an allegation of fraud upon the court, for the law favors discovery and correction of corruption of the judicial process even more than it requires an end to lawsuits." *Lockwood v. Bowles*, D.C.D.C. 1969, 46 F.R.D. 625, 634.

The Supreme Court of the United States, itself, vacated a 1932 Judgment in 1944 that was attack in 1941 on the basis that the Judgment had be procure by way of "fraud upon the court" in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.* 322 U.S. 238 (1944). "Since the judgments of 1932 therefore must be vacated, the case now stands in the same position as though Hartford's corruption had been exposed at the original trial."— *Hazel* Id. supra at 250.

Numerous United States Courts of Appeals have held that "fraud upon the court" has no time limit. "...a decision produced by fraud upon the

court is not in essence a decision at all and never becomes final" —7th Circuit, United States Court of Appeals, *Kenner v. Commissioner of the Internal Revenue*, 387 F.2d 689, 691, certiorari denied 89 S.Ct. 121, 393 U.S. 841, 21 L.Ed.2d 112. See also the 2nd Circuit, U.S. App., *Serysko v. Chase Manhattan Bank*, 461 F.2d 699, certiorari denied 93 S.Ct. 173, 409 U.S. 883, 34 L.Ed.2d 139; or the 10th Circuit, U.S. App., *Wilkin v. Sunbeam Corp.*, 405 F.2d 165; or the District of Columbia Circuit, U.S. App., 195 F.2d 774; or the 9th Circuit, U.S. App., *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 625, 640, citing Wright & Miller, affirmed C.A. 9th, 645 F.2d 699, certiorari denied 102 S.Ct. 976, 454 U.S. 1126, 71 L.Ed.2d 113." See WRIGHT-MILLER-KANE, Federal Practice and Procedure § 2870, pages 409-412.

The Superior Court for the District of Columbia's January 12, 2004 Order in Johnson v. District of Columbia, Civil Action 3837-98 states in pertinent part: "Where, as here, the plaintiff asks the court to vacate judgment due to fraud, he must show the following elements with respect to defendants' behavior: (1) a false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action taken in reliance upon the representation. *Cobb v. Cobb*, 116 WLR 1993 (Super. Ct. 1998). Assuming the plaintiff proves all five of the above elements, the court may then set aside the earlier decree, even if the present case was filed well after the general year-long

limitation. *Cobb v. Cobb* Id. supra is the vacate of a 1976 Judgment in 1998 for fraud upon the court.

Tony Lee and McGuireWoods LLP were not "barred" from pursuing Johnson's federal civil rights claims by the D.C. Code 12-309 notice requirement, as a matter of law. See *Brown v. United States*, 239 U.S.App.D.C.345, 356-357 (en banc): "We hold that appellant's noncompliance with 12 D.C. Code § 309 cannot bar his federal claims".

Tony Lee and McGuireWoods LLP were not "barred" from pursuing Johnson's right to the recovery of his real property by D.C. Code 12-301(1). D.C. Code 12-301(1) allows a plaintiff a 15 year statute of limitation to recovery real estate that the plaintiff has lost as a direct result of the conduct of a defendant. The District of Columbia ran Johnson out of business, and close his business down through the uses of police power and governmental authority, causing Johnson to lose his real property when they destroyed the income that the business was producing by closing it down, so that, Johnson loss the income which enabled him to pay the $2,900.00 monthly payments on his commercial building.

Tony Lee and McGuireWoods LLP were not "barred" from pursuing Johnson's federal civil rights claims by the "doctrine of equitable tolling". The elements for equitable tolling are, 1) that plaintiff has been pursuing his or her rights diligently, and 2) that some extraordinary

circumstance stood in his/her way." See *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Johnson pursed his rights diligently from the moment he filed the lawsuit in 1998 in the Superior Court, until now in 2008. To understand the "extraordinary circumstance" that stood in Johnson's way, it would require the Supreme Court to read the 106 page Amended Complaint, and to hear about the crushing poverty inflicted on Johnson that was the result of the "attacks" on Johnson and his business by the District of Columbia, it's police officers, and its attorneys who committed "fraud upon the court".

Tony Lee and McGuireWoods LLP simply did not want to purse Johnson's claims, because of the fact that Johnson is a White man of mixed racial ancestry. Moreover, they did not due for Kenneth W. Johnson what they have done for their other clients. Tony Lee used the long handled spoon in dealing with Kenneth W. Johnson from the very beginning of the relationship. First he signed the name of another attorney, that Johnson has never even met, to the retainer agreement right in front of Johnson's face, then after Johnson protested, he still would not sign his entire name, "Tony S. Lee" but would only sign his initials "T.S.L." to the retainer. He engaged in racial discrimination towards Johnson: See the Amended Complaint at pages 51-61 and the Amended Complaint at pages 68-79.

CONCLUSION

For the reasons set forth herein, Johnson asks the Supreme Court of the United States to grant this Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, and asks the Supreme Court to mandate that the "Record" in the United States Court of Appeals for the District of Columbia in the case of Johnson v. Gadson et al., 06-7171 and 06-7204 be certified and transferred to the Supreme Court of the United States for review.

Kenneth W. Johnson

9803 Allenford Circle, Apt. 203
North Potomac, MD, 20850
240-314-7188